United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1154

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, :

- v - :

BURNEY ACTON, JOSEPH AZZERONE, MICHAEL CLEGG, HOWARD FINKELSTEIN a/k/a ROBERT HOWARD, JACK LEVINE, RICHARD McKIBBON, ANTHONY SCARDINO, ALAN SEGAL and EDWARD ZUBER, :

Appellants. :

- X

On appeal from the United States
District Court for the Southern
District of New York

REPLY BRIEF FOR APPELLANT ANTHONY SCARDINO

ELEANOR JACKSON PIEL
Attorney for Appellant
Anthony Scardino
36 West 44th Street
New York, N.Y. 10036
Tel. (212) MU 2-8288

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REPLY BRIEF FOR APPELLANT ANTHONY SCARDINO

With respect to appellant Scardino's contentions, the government has failed to meet the issues raised either on the facts or the law. As to this appellant it may be said:

> "Its [the government's] hyperbole in description is in many instances unsupported by the record or by any record references justifying its statements." United States v. Aloi, 511 F.2d 585, 592 (2 Cir. 1975), on Rehearing Dkt No. 74-1220 July 7, 1975 slip op. 6093.

The government's brief ignores and minimizes the thrust of appellant Scardino's brief which emphasizes the absence of proof in the record as to Scardino's knowledge of the aims of the alleged conspiracy "to secure control of many thousands of shares of stock never registered with the S.E.C." or of any claimed illegality involved in Segal's New York stock

sale manipulations.

Said the government:

> "After Acton and Clegg had accumulated the bulk of the controlling shares in Pioneer, they explained to Scardino their plan to raise funds for a mine (JA 216, 558)" (Appee's Br. p. 27).

There is no such testimony in the record reflected on those pages or otherwise. At JA 219 in the record Acton testified that he showed Segal a report on a mining property -- but there is no mention of his discussing any particular detailed plan to raise funds for the mine with Scardino. Moreover, all the conversations with Scardino were reported to be of a generalized character (JA 222). At JA 558, all Clegg remembered of a conversation with Scardino was that they (Acton and Clegg) were

> "several months behind schedule on the stock trading; [and he asked Scardino] do you have any ideas on how somebody can get a public company trading, retrading." (JA 558)

Continuing this inaccuracy, the government states that "Scardino touted[1] Segal "as 'one of the best in the country at . . . trading stock.'" The record reference shows that Clegg, a co-conspirator who had pleaded guilty to the conspiracy count, testified:

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1. The use of "touted" here is a term of art intended to persuade this Court that Scardino illegally "touted" stocks to the public. In fact "touting" appears in the conspiracy charge of the indictment (JA 9).

> "Mr. Scardino said that Al Segal was one of the best in the country at selling or whatever, trading stock and that he had a great deal of money himself and would probably be able to help the mining operation and so forth if he liked the deal." (JA 560)

Clegg further described the conversation with Segal at their first meeting which took place with Scardino present. Nonetheless there is no suggestion that Scardino participated in that conversation -- that any sort of "artificially high price" was discussed or that there was any reference to any illegal activity, viz.:

> "Q. Was anything discussed at that meeting in Mr. Scardino's presence concerning a false scheme to manipulate stock?
>
> "A. [Acton] No sir. [JA 396)
>
> * * * *
>
> "Q. But you can say with certainty, can you not, that at any meetings at which Mr. Scardino was present that no plan to defraud anybody was discussed in his presence?
>
> * * * *
>
> "A. [Acton] Yes sir." (JA 398)
>
> * * * *
>
> "Q. Were you ever at any meeting with Mr. Scardino during the period of time at which was discussed in Mr. Scardino's presence any scheme to artificially raise the price of Pioneer stock?
>
> * * * *
>
> A. [Clegg] No." (JA 651)

There is no suggestion in the record that Scardino

knew anything about the details of the Pioneer stock transactions or that he intended to play any role in the resale of the securities of the pre-1933 public company on the market.

It was after the project was launched, stock was being traded in New York and in November 1969 that Acton went to Scardino and told him of needing money. Scardino also needed money, Acton said, and offered to borrow a larger amount on a pledge of stock through "a trust of some type" (JA 253, 254). Up until that time and after this introduction of Acton and Clegg to Segal, Scardino played no role whatsoever in making arrangements for the sale of the stock. Moreover there was no evidence nor any contention by the government that Scardino participated in any of the complicated negotiations, sales and trades of Pioneer stock in New York where the market for the stock was made through Segal.

Scardino was tied into the conspiracy by three peripheral transactions which involved Pioneer stock. As to two of those transactions, Acton transferred stock certificates to Scardino's name presumably to be pledged but which stock shares were sold by a third person holding a power of attorney, one Richard McKibbon -- an indicted co-conspirator and a fugitive at the time of trial. The sale of the stock was not consistent with the avowed aims of the conspiracy which involved an agreement that there be no sales of the stock outside of New York and not authorized by Segal. Furthermore, the sale

of the stock per se did not import knowledge to the seller of any illegal scheme to manipulate the stock. The record is completely unclear as to whether or not Scardino actually believed he was selling the stock through McKibbon or whether Scardino believed it was being pledged.

What is clear, however, is that Scardino and Acton both believed that he (Scardino) was borrowing money from Acton in connection with the stock transactions.

In order to make it appear otherwise and to tie Scardino into the government's claimed over-all conspiracy dominated by the three alleged main co-conspirators (Acton-Clegg-Segal), the government erroneously at trial and in its brief on the appeal maintains that Scardino admitted his guilt and connection to Segal by promising to repay the proceeds he realized from the pledge or sale of the stock to Segal (JA 1369, Appee. Br. p. 30 note). This is simply not true. The government, however, in its brief before this Court adopts the erroneous statement made by the prosecutor in his summation that "The testimony when viewed in a manner most favorable to the Government . . . plainly supports the interpretation argued by the prosecution on summation that Scardino agreed to repay Segal" (JA 291-93, Appee. Br. p. 30 note).[2]

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2. This misinterpretation of the record is crucial to the government's argument for it is on this erroneous argument that the government supports its contention that there was only one conspiracy in which Scardino was involved, viz.: "In this way [by promising to repay Segal] Scardino and McKibbon repaired the damage keeping the single conspiracy intact" (Appee. Br. p. 30).

The record reference to this is Acton's description of what happened including a reference to Scardino's surprise on learning that the stock was sold (JA 406). The record is further clear, however, that there was a borrower-lender relationship between Scardino and Acton and no such relationship between Scardino and Segal, viz.:

> "Q. And I think you testified that out of the proceeds of the loan that Mr. Scardino or Mr. McKibbon was to get by pledging that stock, you had agreed to lend Mr. Scardino $7500, is that right?
>
> "A. [Acton] Yes sir.
>
> "Q. So if Mr. Scardino did receive funds from that stock it was with your understanding and acquiescence, is that right?
>
> * * * *
>
> "A. [Acton] Yes sir." (JA 402, cf. JA 292)

THE COURT'S ERRONEOUS CONSPIRACY CHARGE

Appellant Scardino has argued in his brief, p. 22, that the evidence revealed the possibility of three conspiracies, related only in that they involved Pioneer stock and had overlapping principals but separate participants. There was no evidence whatsoever to tie Scardino with the charged conspiracy to manipulate and control the sale of Pioneer stock other than his introduction of Acton and Clegg to Segal. Moreover out of twenty-nine government witnesses only five witnesses even mentioned defendant Scardino.

Appellant has argued at length the prejudice of his being charged along with the others -- the prejudice of the spill-over effect of the evidence and the instructions having to do with a single conspiracy. The government's riposte is to deny that Scardino was "on the periphery" of anything (Appee. Br. p. 31). This Court has recently criticized these government tactics.

> "In view of the frequency with which the single conspiracy vs. multiple conspiracy claim is being raised on appeal before this court . . . we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case." United States v. Sperling, 506 F.2d 1323, 1340 (2 Cir. 1974, cert. den. 43 U.S.L.W. 3474, March 3, 1975.)

The thrust of the testimony of the twenty-four witnesses not connected to Scardino was to weave a web of evidence showing how Segal was connected to a number of different stock transactions which resulted in his gain of several hundred thousand dollars. Such testimony was calculated to persuade the jury to convict Segal on a maximum number of counts and indeed the jury did convict him as well as the appealing co-defendants. The government has either ignored or disregarded appellant Scardino's argument that the jury was faced with a dilemma if it determined that there were two or three conspiracies rather than one. If the jury found there were separate conspiracies involving Scardino and others, it would

be obliged then to acquit all the defendants, including Segal under the court's instructions (JA 1450). This was the same dilemma faced by the jury in United States v. Kelly, 349 F.2d 720, 757-758 (2 Cir. 1965), cert. den. 384 U.S. 947 (1966).

The government would have this Court believe that the rule of Kelly was repudiated in United States v. Sperling (supra), United States v. Bynum, 485 F.2d 490, 497 (2 Cir. 1973), vacated and remanded on other grounds, 417 U.S. 903 (1974), and in the recent decision of United States v. Cohen, Dkt No. 74-2026 (2 Cir. June 26, 1975). This is simply not true. In Sperling, Bynum and Cohen this Court found on the facts in each that there was but one conspiracy pleaded and proved. Nor did this Court find the peculiar fact situation shared by Shuck in Kelly and Scardino here.

THE COURT'S ERRONEOUS PINKERTON CHARGE

The testimony of both Acton and Clegg -- the testimony of whom had to be believed to support Scardino's conviction -- was that there was never any discussion in Scardino's presence of any illegal stock manipulation scheme or other illegality (this brief p. 3). The stock certificates themselves appeared to be in due order and it would require some degree of expertize not attributable to Scardino to impute knowledge that they should have been registered. If this testimony of Acton and Clegg is accepted, Scardino could not have been guilty of the substantive offenses with which he was

charged either as a principal or as an aider and abettor (Counts 4, 11, 12, 13, 14, 16, 30, 32, 37).

Under these facts the court instructed the jury that if "the defendant under consideration . . . was then also a member of that conspiracy . . . you may find the defendant guilty [of the substantive crimes]" (JA 1459). This was the so-called "Pinkerton" instruction [Pinkerton v. United States, 328 U.S. 640 (1946)].

In United States v. Sperling, supra, this Court stated:

> "We should like to note, however, that the charge based on Pinkerton v. United States, 328 U.S. 640, 645 (1946), here given to the jury by Judge Pollack, should not be given as a matter of course." 506 F.2d 1341.

In the case at bar, the reasoning the jury must have pursued is as follows:

The apparent manipulation of the market in Pioneer stock which involved the market opening at an arbitrarily high figure of $5 per share for a company then without substantial assets must have involved wrongdoing on the part of the main beneficiaries -- Acton, Clegg and Segal. In order that Segal be found guilty of this conduct as a crime (Acton and Clegg having already pleaded guilty to conspiracy and a substantive count) we must find there was but one conspiracy. If we so find, since Scardino profited from the manipulations when he received money from McKibbon on the sale of Pioneer

stock, and also because he was the business partner of Segal in a hotel in Reno and introduced Segal to Acton and Clegg, he must have been in the conspiracy too. If he is in the conspiracy that is sufficient to supply the proof that he knew that it was unlawful to sell unregistered stock under the circumstances of this case -- ergo, his guilt on ten counts.

As set forth in more detail in appellant's brief, this is a dramatic example of spill-over and underlines the error of the court's charge and its abuse of discretion in refusing a motion for severance.

CONCLUSION

The judgment of conviction of Anthony Scardino should be reversed.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for appellant
Anthony Scardino

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3 Copies Received

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, U.S. Attorney